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No. 99-1225

IN THE

Supreme Court of the United States

PARSONS CORPORATION; PARSONS ENGINEERING SCIENCE, INC.; PARSONS ENVIRONMENTAL SERVICES, INC.; AND THE RALPH M. PARSONS COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* JANET C. OLIVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONERS

i. Whether the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729, unconstitutionally extends federal court jurisdiction beyond Article III limits by permitting an action by a plaintiff who has not suffered a "particularized" injury and who therefore lacks standing under Article III, Section 2.

ii. Whether allowing a *qui tam* plaintiff standing to assert an injury to the United States is contrary to this Court's holding that only "officers of the United States" appointed pursuant to Article II, Section 2 may conduct civil litigation on behalf of the United States.

iii. Whether allowing a *qui tam* plaintiff standing to assert an injury to the United States violates constitutional separation of powers because it limits the President's ability to control the prosecutorial powers wielded by a *qui tam* plaintiff and thereby conflicts with the President's duty to "take care that the Laws be faithfully executed."

iv. Whether a person can be liable for presenting a false claim under the False Claims Act, 31 U.S.C. § 3729, when that claim is based upon an admittedly reasonable interpretation of an ambiguous regulation or statute.

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NOW COMES RESPONDENT and respectfully files a Response to the Petition for Writ of Certiorari made by Petitioners Parsons Corporation, *et al.* as ordered on April 7, 2000.

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONAL ARTICLE III STANDING QUESTIONS SHOULD NOT BE ENTERTAINED.

The Petitioners have presented three constitutional standing questions. (Questions i, ii and iii, Page i of the Petition). All three of the questions were not raised nor briefed nor argued in the United States District Court nor in the United States Court of Appeals for the Ninth Circuit but have already been briefed and argued before this Honorable Court in *State of Vermont Agency of Natural Resources v. United States of America ex rel. Jonathan Stevens*, USSC Docket Number 98-1828, and the related action, *Joyce Riley v. St. Luke's Episcopal Hospital*, USCA Docket Number 97-20948 (5th Cir.).

In response to the Petition for Writ of Certiorari, the Respondent references and incorporates the Supplemental Brief for the United States by the Solicitor General and the Supplemental Brief concerning Article III Standing by Taxpayers Against Fraud in the *Stevens* case and the Supplemental En Banc Brief for the Intervenor/Appellant United States in the *Riley* case.

Perhaps too simplistically, Respondent respectfully submits that this Honorable Court has already addressed the

issue in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 943 (1997), wherein a new cause of action for the Coplaintiff Relator was held to have been created by the United States Congress in the 1986 Amendment to the False Claims Act, 31 U.S.C. § 3729 *et seq.*, to wit:

> In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.

In *Schumer*, the Department of Justice did not intervene, yet this Honorable Court took that opportunity to confirm a new cause of action for the Coplaintiff Relator under the False Claims Act by the United States Congress. If this Honorable Court should desire to revisit that creation of a new cause of action under the False Claims Act, then the issue simply should be whether the United States Congress has had the constitutional authority to enact the False Claims Act since the Civil War.

More than $3 billion have been recovered under the False Claims Act since the 1986 Amendment thereto, complemented by the deterrent effect upon the recipients of federal funds. Most recently, on April 13, 2000, Congress passed H. CON. RES. 290, its budget resolution for Fiscal Year 2001. The resolution included a Sense of the Senate provision:

SEC. 317. USE OF FALSE CLAIMS ACT IN COMBATTING MEDICARE FRAUD.

(a) FINDINGS — The Senate finds that —

(1) the solvency of the medicare trust funds is of vital importance to the well-being of the Nation's seniors and other vulnerable people in need of quality health care;

(2) fraud against the medicare trust funds is a major problem resulting in the depletion of the trust funds; and

(3) chapter 37 of title 31, United States Code (commonly referred to as the False Claims Act) and the *qui tam* provisions of that chapter are vital tools in combatting fraud against the medicare program.

(b) SENSE OF THE SENATE — It is the sense of the Senate that the levels in this resolution assume that chapter 37 of title 31, United States Code (commonly referred to as the False Claims Act) and the *qui tam* provisions of that chapter are essential tools in combatting medicare fraud and should not be weakened in any way.

The Sense of the Senate provision had bipartisan sponsorship from Sen. Charles Grassley (R-IA) and Sen. Kent Conrad (D-ND) and was adopted by voice vote in the Senate Budget Committee. The full text of the budget

resolution may be found on the Library of Congress website, located online at http://thomas.loc.gov.

The instant Qui Tam action was filed on August 14, 1995. On November 1, 1996 the United States Government elected not to intervene in the Qui Tam action as it was entitled to do under False Claims Act, 31 U.S.C. § 3730(b)(2), nor did the United States Government move to dismiss the Qui Tam action as it likewise was entitled to do under False Claims Act, 31 U.S.C. § 3730(c)(2)(A), but on the same day the Department of Justice wrote the extraordinary letter to Counsel for Petitioners-Defendants dated November 1, 1996, to wit:

> As you know, the United States has declined to intervene at this time in the above-referenced case. However, please be advised that the declination is not intended, and should not be construed, as any indication that the United States or any of its departments or agencies, including the Department of Justice, approves of, sanctions, or acquiesces in your clients' accounting practices addressed in the relator's complaint.

It is respectfully submitted that in the event that the United States Attorney General elects not to intervene under the False Claims Act, 31 U.S.C. § 3730(b)(e) but does not move to dismiss the Qui Tam action pursuant to the False Claims Act, 31 U.S.C. § 3730(c)(2)(A), the United States Attorney General thereby grants consent and permission by the Executive Department for the Coplaintiff Relator to conduct the Qui Tam litigation, certain to confront the challenge of Rule 12 and 56 motions by the Qui Tam Defendant.

II.

THE PETITION FOR WRIT OF CERTIORARI MISSTATES THE QUESTION AND THE LAW CONCERNING THE NINTH CIRCUIT DECISION.

The Petitioners have presented one new question of law concerning the Ninth Circuit decision in the Petition for Writ of Certiorari, to wit:

> iv. Whether a person can be liable for presenting a false claim under the False Claims Act, 31 U.S.C. § 3729, when that claim is based upon an admittedly reasonable interpretation of an ambiguous regulation or statute.

The Petitioners misstate the record by the use of the adjectives *admittedly* reasonable interpretation and *ambiguous* regulation or statute. There is no admission of a reasonable interpretation. Quite to the contrary, the Ninth Circuit has ruled that there is a genuine issue of fact for trial. The United States District Court did hold that there was an ambiguous regulation or statute without identifying the provision of the regulation or statute that was supposedly ambiguous. It is respectfully submitted that this Honorable Court should not assume that the Cost Accounting Standards laws, regulations and standards *per se* are ambiguous nor that some unidentified provision of the Cost Accounting Standards laws, regulations and standards is ambiguous.

Petitioners have misstated the law of proof under the False Claims Act (Page 29 of the Petition), to wit:

> To that end, Congress has specifically required that the United States prove both objective

> reasonableness (falsity) and subjective intent to defraud (scienter) before imposing liability under the False Claims Act, including liability for treble damages, penalties, and attorneys' fees and costs.

In the 1986 Amendment to the False Claims Act, 31 U.S.C. § 3729(b), the United States Congress legislated that "no proof of specific intent to defraud is required".[1] Undaunted, the False Claims Act Defense Bar creatively argued that instead of "intent" that "scienter" had to be proved. During the argument before the Ninth Circuit, Counsel for Respondent stated that he hoped that the Ninth Circuit would explain the difference between "intent" and "scienter" as applied to the False Claims Act. The Presiding Judge, Hon. Stephen Reinhardt, in another concurrent decision, filed on July 13, 1999, *United States ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.*, 183 F.3d 1088, 1092-93 (9th Cir. 1999), emphasized the statutory language when describing the scienter requirement under the False Claims Act, to wit:

> We turn now to the question of scienter. The False Claims Act imposes liability only on those who "knowingly" present a "false or fraudulent claim" to the government. See 31 U.S.C. § 3729(a)(1). Mere negligence and "innocent mistake[s]" are not sufficient to establish liability under the FCA. *United States ex rel. Hochman v. Nackman*, 145 F.3d 1069, 1073 (9th Cir. 1998). While some of our cases may contain extraneous

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1. The decisions cited prior to the 1986 Amendment to the False Claims Act on the issue of proof of intent are irrelevant to the post 1986 False Claims Act standards of proof, 31 U.S.C. § 3729(b).

comments that might be read out of context to suggest that the FCA requires an intentional lie to trigger liability, those cases almost invariably reiterate the controlling statutory language that is determinative of their outcome. As the FCA provides, to rise to the level of "knowing" presentation, all that is required is that the party:

> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,
>
> *5 and no other proof of specific intent to defraud is required.

31 U.S.C. § 3729(b). We have repeatedly emphasized this statutory language when describing the scienter requirement under the FCA. *See, e.g.*, *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Thus, in order to be liable for an FCA violation, Roen's conduct need only qualify under one of the alternative statutory standards, such as "deliberate ignorance" or "reckless disregard".

In the instant Qui Tam Action, Counsel for Respondent introduced *de novo* and the United States District Court accepted a new "reasonable interpretation" theory of proof for defense against liability under the False Claims Act, which was rejected by the Ninth Circuit citing the Amicus Curiae Brief by the United States (Page 12a, Note 3, Appendix A of Petition), to wit:

> 3. The amicus brief submitted by the Government correctly points out the potential problem created by embracing a "reasonable interpretation" exception to the "falsity" of a claim. A defendant could submit a claim, knowing it is false or at least with reckless disregard to falsity, thus meeting the intent element, but nevertheless avoid liability by successfully arguing that its claim reflected a "reasonable interpretation" of the requirements.

A. There Is No Split With The Fifth And Seventh Circuits.

The argument by Petitioners that there is a split with the Fifth and Seventh Circuits has been rejected by the Ninth Circuit (Pages 4a, 14a and 15a, Appendix A of the Petition) which distinguished the *Lamers*, *Weinberger* and *Luckey* decisions upon which Petitioners rely, to wit:

> Parsons also argues in its petition for rehearing that our holding splits from the Fifth and Seventh Circuits, asserting that those courts have adopted a "reasonable interpretation" approach to falsity. However, the cases cited do not support a conclusion that other courts have

taken this view of "falsity." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999) did not reach the issue and instead combined the issues of falsity and scienter, "our consideration of the falsity question will be incorporated into our knowledge discussion." *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (5th Cir. 1977) also did not address the question of reasonable interpretation and instead looked to legislative history in order to determine the appropriate statutory interpretation. Finally, in *Luckey v. Baxter Healthcare Corp.*, 2 F.Supp.2d 1034, 1047 (N.D.Ill. 1998), aff'd, 1999 WL 482670 (7th Cir. July 12, 1999), the court held that the exercise of legitimate scientific judgment did not allow a finding of falsity. "Courts have consistently declined to find that a contractor's exercise of scientific or professional judgment as to an applicable standard of care falls within the scope of the FCA." *Id.*

In short, Parsons' petition arguing that the sky will fall upon government contractors if they are precluded from relying on a "reasonable interpretation" is not only unsupported by case law, it is also ungrounded in reality.

CONCLUSION

Respondent prays that this Honorable Court denies the Petition for Writ of Certiorari

Respectfully submitted,

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